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No. 88-1253

In the Supreme Court of the United States

OCTOBER TERM, 1988

SALVATORE T. "SAM" BUSACCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the jury instructions at petitioner's trial created the possibility of a non-unanimous verdict.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 863 F.2d 433.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1988. The petition for a writ of certiorari was filed on January 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of embezzling funds from a labor organiza-

tion, in violation of 29 U.S.C. 501(c) (Count 1); three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 2, 3, and 16); four counts of embezzling funds from an employee benefit plan, in violation of 18 U.S.C. 664 (Counts 17, 18, 21, and 22); one count of accepting a kickback to influence the operations of an employee benefit plan, in violation of 18 U.S.C. 664 (Count 23); two counts of making a false statement on a document required to be kept by the Employment Retirement Income Security Act of 1974 (ERISA), in violation of 18 U.S.C. 1027 (Counts 30 and 31); one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 32); one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 33); and four counts of filing a false income tax return, in violation of 26 U.S.C. 7206(1) (Counts 34-37). He was sentenced to an aggregate term of ten years' imprisonment and was fined $35,000. The court of appeals affirmed (Pet. App. A1-A13).[1]

1. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A2-A4). It showed that petitioner was the president of the Excavating, Building Material, Construction Drivers, Race Track Employees, Manufacturing, Processing, Assembling, and Installer Employees Local 436 of the International Brotherhood of Teamsters (Local 436). He was also the chairman of the board of trustees of the Local 436 Welfare Fund and the Local 436 Pension Trust Fund.

In 1981, Jethro Robinson, an independent trucker, died in an accident. Although he was a member of Local 436, Robinson was not entitled to death benefits from the Welfare Fund. Nevertheless, petitioner and his confeder-

[1] Petitioner was acquitted on 23 counts of the 39-count indictment.

ates decided to submit a fraudulent $28,000 claim to the Welfare Fund for accidental death benefits on Robinson's behalf. They also agreed to split the proceeds from that claim. To make it appear as if Robinson were entitled to a death benefit from the Welfare Fund, petitioner caused the Local to make a $2,465 payment to the Welfare Fund on Robinson's behalf. As a result of that payment, petitioner was charged with embezzlement from a labor organization. Pet. App. A2-A3.

Petitioner also arranged to receive kickbacks from merchants who did business with the Welfare Fund. In particular, petitioner demanded that the merchants charge the Welfare Fund excessive fees for goods and services and remit the difference to him and one of his confederates. That scheme formed the basis for the charge of embezzlement from an employee benefit plan. Pet. App. A3-A4.

At trial, the district court instructed the jury that there were two theories under which petitioner could be convicted of embezzling funds from a labor organization. The court first advised the jury of the elements common to both theories: that there was a union; that petitioner was a union official or employee; that petitioner embezzled union property; and that petitioner had a fraudulent intent to deprive the union of its property. The court then instructed the jurors that they must determine whether the expenditure by the union was unauthorized; if the jurors found the expenditure to be unauthorized, they were to go no further. If, on the other hand, the jury found that the government had not proved the expenditure to be unauthorized, the trial court explained that "in order to find [petitioner] guilty of the offense charged in Count I of the indictment the Government has the burden of proving each of the additional essential elements of that offense by proof beyond a reasonable doubt: *ONE*: a fraudulent intent by [petitioner] to deprive Teamsters Local Union 436

of its funds; and *TWO*: a lack of good faith belief by the [petitioner] that the expenditure was for the legitimate benefit of the union." Pet. App. A7. The court also instructed the jury that its verdict had to be unanimous (*id.* at A8 & n.2).

2. The court of appeals affirmed (Pet. App. A1-A13), rejecting petitioner's claim that the trial court's instructions created the prospect of a non-unanimous verdict. The court explained that "in routine cases, a general unanimity instruction will be sufficient to ensure that the jury reaches its verdict properly" (*id.* at A8). In this case, the court of appeals concluded, the trial court's unanimity instruction was sufficient. Moreover, the court stated, the instructions on the elements of embezzlement could not have confused the jury, since the instructions made it clear that the jury was to consider the elements of an authorized expenditure only if it first concluded that the government had failed to prove an unauthorized expenditure beyond a reasonable doubt (*id.* at A10). The court also noted (*id.* at A11) that the statute at issue, 29 U.S.C. 501(c), "creates one generic offense, stealing money from a union, that can be proven in two different ways," and that by convicting petitioner the jury had unanimously agreed that he had stolen money from Local 436.[2]

ARGUMENT

Petitioner contends (Pet. 12-18) that the district court's instructions on the elements of embezzlement from a labor organization created the possibility of a non-unanimous verdict. There is no merit to that claim.

[2] In addition, the court of appeals rejected petitioner's challenge to the trial court's instructions on the elements of embezzlement from an employee benefit plan (Pet. App. A12). It also rejected petitioner's assertion that the verdicts were fatally inconsistent (*id.* at A13). Those claims are not presented in the petition.

In routine cases, a general instruction that the jury must agree unanimously on its verdict is sufficient to ensure jury unanimity. See *United States* v. *Ryan*, 828 F.2d 1010, 1019-1020 (3d Cir. 1987); *United States* v. *Williams*, 737 F.2d 594, 613-614 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *United States* v. *McClure*, 734 F.2d 484, 494 (10th Cir. 1984); *United States* v. *Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). Here, the district court told the jury that "[a]ny verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous." Pet. App. A8 n.2. That instruction was entirely sufficient.

Petitioner is mistaken in suggesting that the embezzlement instruction permitted the jury to divide its votes among the two available theories. Rather, as the court of appeals explained (Pet. App. A7, A10), the jury was instructed to address the two theories sequentially. Only if it failed to accept the government's proof that the expenditure was unauthorized was the jury to consider the proof of authorized, but fraudulent expenditure. There was therefore no risk that the instructions produced a non-unanimous verdict.

The Third Circuit's decision in *United States* v. *Beros*, 833 F.2d 455 (1987), is easily distinguishable. In *Beros*, the court of appeals reversed the defendant's conviction because each of several counts of the indictment alleged multiple acts in violation of Section 501(c). The court concluded that the defendant may therefore have been convicted without a unanimous determination that he committed any particular act in violation of the statute. By contrast, the instructions in this case directed the jury to

consider the second theory of liability only if it was unable unanimously to convict petitioner on the first theory. Thus, in this case, unlike in *Beros,* there was no risk that the jury convicted based on "a composite theory of guilt" (*Beros,* 833 F.2d at 462).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner's reliance on *United States* v. *Marolda,* 615 F.2d 867 (9th Cir. 1980), is entirely misplaced. In that case, the court of appeals held that the instructions at trial impermissibly varied from the charges contained in the indictment. The court did not hold that the instructions created a possibility of a non-unanimous verdict.

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